



THE UNITED STATES ATTORNEY'S OFFICE
SOUTHERN DISTRICT *of* NEW YORK

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Justice News

ACFE's Global Fraud Conference Prepared Remarks Of U.S. Attorney Preet Bharara

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Thank you, Dr. Wells, for that kind introduction, and for that forced standing ovation. That's a good way to do it. Ask people to stand.

It's an unbelievable honor to be here and to speak to all of you in this small and intimate setting. Since I have all of you here, and as I understand it, some of the greatest fraud examiners in the history of our country, who know a lot about math and who know a lot about accounting, and who have phenomenal memories, I thought I would ask you, just amongst ourselves, by a show of hands, how many of you count cards?

I'm going to need to speak to a few of you after the program.

Anyway, thank you for recognizing me with the Cressey Award. It is a great honor to be included among the ranks of the world's leading fraud fighters, and also to accept this award on behalf of the dedicated men and women of my Office.

It happens to be the case that any honor I get is really on behalf of the men and women of the Southern District of New York who, for more than 200 years, have been doing the work of the public and the kind of work that the District appreciates.

All praise and credit really goes to them, and also to the agencies we work closely with, including the FBI, the SEC, and the IRS, among others.

I discovered some time ago that if you hire people who are better and smarter than you are, you can actually win a lot of awards. It's a good policy and practice.

I'm especially delighted to get an award that's named after Dr. Cressey. I did some looking, and I came across one quote by the late Dr. Cressey in which he said, "Things in law tend to be black and white. But we all know that some people are a little bit guilty, while other people are guilty as hell." A man after my own heart.

Fighting fraud is a critical part of the work we do every day in the Southern District of New York.

I am very happy to be here today with all of you who are on the frontlines of one our era's defining battles – the fight against fraud. You are the elite and highly trained professionals who, in your range of roles and industries, hold a vital responsibility – that of preventing, detecting and deterring fraud in your organizations.

You are the firewall; in some cases, you are the only thing standing between a successful fraud and a thwarted scheme.

I know I don't have to impress upon this group how important a task this is, and how important your work is. This is really an exercise in preaching to the choir.

As every single one of you knows, rooting out fraud can mean, for a company, the difference between record profit for shareholders and pink slips for its employees.

It can mean, for a city, the difference between a robust teaching corps or police force and mass layoffs.

It can mean, for the average investor, the difference between college tuition and an education cut short.

And it can mean, for a pending retiree, the difference between a life-saving pension and life-altering poverty.

This is, if I dare say so in Vegas, God's work that you are doing. But we all understand that there are substantial obstacles to getting the job done, even for the most intrepid and well-meaning fraud fighter.

Or, as Samuel L. Jackson said in Pulp Fiction, "The path of the righteous man is beset on all sides by the iniquities of the selfish and the tyranny of evil men."

Someone once bet me that I wouldn't quote from Pulp Fiction in a speech. Well, I just did.

Some people may assume that I would talk about the victories of our Office. We are very proud of the work that we have done, and it's that work that's being recognized. I want to say two things; then I want to talk about something else.

We have spent some time, but not all of our time, on insider trading cases, and people have come to recognize the Office for a lot of those cases. The record as it stands at the moment is 81 charged and 73 convicted, and no one has been acquitted.

And just this morning, some of you may have been at the conference and not been paying attention to the news, but the Second Circuit Court of Appeals, in a unanimous decision, upheld the conviction in all respects of Raj Rajaratnam, who is serving his sentence as we speak.

So we're very gratified by that ruling, as you might imagine.

But I want to talk about culture, and obstacles to ferreting out fraud that I don't think we spend enough time on. There are many obstacles. Some of them are legal and technical, but I want to talk about obstacles that are human and cultural.

To be sure, there are unprecedented technical and practical obstacles to ferreting out fraud.

For starters, today, there is the sheer volume of transactions. These days, contracts are for billions of dollars, not millions of dollars. Now, transactions involve not one party and one counterparty, but dozens of parties. Sometimes, they're shell companies, and they reside not just in the United States, but in the Caribbean, and Europe, off the coast of Africa, and in other far-flung places.

But today, I want to talk about culture, and maybe exhort you to get others to think about culture also.

The first culture problem is this:

In too many places and in too many quarters, there seems to have taken root a culture of minimalism – by that, I mean a culture of merely aspiring to the minimum; doing merely the minimum required to avoid an enforcement action or a criminal charge, rather than focusing affirmatively on doing the right thing, staying comfortably clear of the line, and earning a robust reputation for integrity and honesty.

I know you agree that the most successful and prominent institutions in the world – whose failure can threaten the entire economy – should always aspire to more than the minimum.

The particular phenomenon that should worry and trouble people is the impulse to walk the line, to aspire to the bare minimum.

Recently, I have been taking the time to speak to prominent and prestigious business groups, trade associations, and business schools.

I tell them some of what I am telling you now – that there is a line between what is legal and what is not – a line that is dangerous to get close to and possibly criminal to cross.

And I have been struck by a question I have been asked on more than one occasion.

It goes something like this: “Mr. Bharara, you've talked about making sure you don't cross the line and that it is dangerous to wander too close to the line. So, exactly how far from the line do you recommend people stay?”

It is asked like it is a geometry problem. I am tempted to say, “Oh, about 3 ½ feet should do the trick.”

I guess it is not an unfair question, given what my thesis is – but I am always a bit taken aback. I answer by explaining that I disagree with the premise of the question; that the orientation of the question is unfortunate and off-base; that if you are single-mindedly focused on walking the line, you are bound to end up afoul of regulators, and God forbid, criminal prosecutors.

Even more dangerous perhaps, you are sending a message to every other person at the firm that line-walking is a good idea. That can work for a while, but will invariably miscalculate and bad things will invariably follow.

A single-minded focus on remaining an inch away from the legal line is just asking for trouble. It's a dangerous thing to walk the line – and to train others to do it.

Walking the line is like a driver constantly trying to game just how close to the legal alcohol limit he can come without getting a DUI. Now, one can do that.

But how long do you think before that driver gets pulled over? How long before that driver blows the legal limit?

And how long before that driver hurts someone on the highway?

Aspiring to the minimum is a recipe for disaster. Fraud is bad, not just for the victims, who suffer the greatest harm, but also for the otherwise law-abiding company that employs the malefactor. Even a single rogue miscreant can torpedo the fittest firm. Even the mere investigation of a corporation can be devastating.

On a related note, as you go about this week, much of the training will be focused, as it should be for any conference of this nature, on learning the law and the accounting practices and the particular rules that make up the specialized fields covered by this conference.

And that is good. It is important to spend time this way.

But it is important from time to time, also, to acknowledge the limitations of those same rules and regulations – even if they were expertly drafted and wisely promulgated.

That is to say, I think we all need to think more creatively and look a little deeper.

In the Southern District a few years ago, there was our successful CityTime investigation, in which we partnered with the City's Department of Investigation on a case in which a government contractor, SAIC, bilked the city for about half a billion dollars for a timekeeping software program.

As that investigation revealed, disclosure requirements, when not sufficiently rigorous, can provide a false sense of security and the illusion of transparency. Currently, only prime contractors and first-tier subcontractors doing work for the City file financial disclosures.

So apparently all you have to do to conceal a fraud and deceive the City is set up a sham second-tier subcontractor.

All of you in this audience are the kind of people that could ferret that out. It's people like you who can be those gatekeepers – before it blows up into a \$500 million problem.

As I like to say when I speak to business people and business students who are educated and smart and have personal integrity: You think something fishy is going on? You're probably right.

This is not to say that rules and regulations should be thrown overboard or that we shouldn't seek to improve and update them. It is to say only that there is more to this project than the cold and hard letters of statutes and rules and policies.

There is the human element, about which I will say more now.

The second culture problem is this: How do we encourage whistleblowers, or sentinels, as you call them?

You know this better than anyone. The best way to find fraud is through human intelligence and human action.

With the stakes so high in the fight against fraud, many intelligent people both in and out of government have expended tremendous energy to figure out how to guarantee an

early-warning system, how to ensure that (to coin a phrase), people who see something, say something – so that problems can be addressed when they are yet molehills, rather than mountains.

For example, legislators have included provisions in the False Claims Act and in Sarbanes-Oxley and in Dodd-Frank and in other laws to incentivize those who see something to say something.

In an ideal world, of course, there would be no need for such incentives. But we live in an imperfect world where human beings act, well, like human beings.

And so, each of the laws I mentioned and every other rule and regulation that has ever sought to promote and protect whistle-blowing and the early detection of corporate malfeasance is a reflection of the difficulty of human dissent in the face of more powerful forces.

This is a sad fact, but it is a fact of life.

There is all too often a human tendency to look the other way. A human tendency not to want to rock the boat.

A human tendency to conform, to get along, to be a team player.

There is the human desire to avoid the ostracism that comes from speaking out; the desire to avoid being branded a troublemaker, or worse, a traitor.

People will sometimes go a long way to suppress many fine and courageous impulses, and they will make many bad choices, to avoid the scorn of their colleagues and superiors.

And when coupled with the more pragmatic concerns of maintaining job security and putting food on the table, these social forces can easily—and seemingly almost always do—overwhelm the initial impulse to do the right thing.

The compulsion to conformity and the impulse to obedience tend to silence all but the most intrepid whistleblower.

Coming forward takes courage. Some call it guts. Whatever the name, it's not easy. If it were, the ACFE would not give an award for it.

Courage is hard. And that's unfortunate. Because the way you find out about most fraud is that someone comes forward.

The central issue in America in combating fraud is how to get people who have seen something to come forward. That's a problem not just of mathematical accounting; it's a problem of psychology, which I hope you appreciate also.

At a conference in London last year, I heard the global head of compliance of a Fortune

50 company put it this way: "I earned a degree in psychology in college before I earned my law degree. And I have found that in this job, which is all about motivating people to act better and modifying ordinary people's behavior, I find myself relying much more on my psychology degree than on my law degree."

I wish people thought a little bit more about the psychology of fighting fraud.

Because the lesson of history generally – and of corporate scandal specifically – is that you cannot legislate a culture of integrity. You cannot will it into existence simply by wishing for it. Nor can you install it in the workplace with even the best-drafted compliance policy or the most thoughtful statutory regime.

More specifically, you cannot – simply by issuing periodic and formalistic admonitions – always rely on even good people in the workplace to come forward the moment they suspect the books are being cooked or the numbers are being faked or the customers are being cheated.

Getting people to listen and report and sound alarms and seek advice requires more than email reminders – it requires understanding what motivates people in real life, people with vulnerabilities and fears and biases and every other ordinary human failing and foible. Email reminders alone cannot prompt creativity or spur productivity or advance morale.

We need to figure out a way to make people feel comfortable coming forward and make sure they're not going to be punished, and they're not going to be ostracized. And, in fact, they will be rewarded and applauded – and not criticized – if they find a substantial amount of fraud that will save the company money.

The question is as simple as this: How to create a culture in which good people say something or do something when they see bad conduct?

And then, how to create a culture in which others will act when the whistle is blown— because, after all, it doesn't matter how loud the whistle is blown if the players on the field are deaf. . . or have chosen to wear ear plugs.

There has to be a culture in which people who see something bad going on feel comfortable coming forward, and, second, people who are taking in the complaints are smart enough and care enough, to do something about it.

History teaches that we are far more confident about our courage to speak up in time of crisis than we have any reasonable right to be.

The single most common question I get at business schools is this: What do I do if I get a bad feeling about something going on?

Students ask it plaintively, and I know in some cases they have particular episodes they are thinking about. It is not an abstraction.

And lest anyone believe this is a problem only in the minds of unformed students, consider the following:

Consider the Galleon Group, Bernard Madoff's firm, or any one of a number of cases where there were many, many good people; but many people knew or suspected that something was going on; and they did nothing—for years.

Consider Deepwater Horizon, the BP facility that exploded, killing workers and depositing so much oil into the Gulf of Mexico.

According to a front-page New York Times story, Deepwater Horizon employees said they often saw unsafe behaviors but only about half of the workers interviewed reported feeling that they could report actions leading to a potentially 'risky' situation without reprisal.

The long-term solution for every firm lies in creating a corporate culture in which dissent is openly permitted; candor is duly fostered; and integrity is cultivated and even rewarded.

That, of course, is easier said than done. It is not something that happens in an instant— and a corrupt corporate culture cannot be magically transformed overnight, even with the adoption of ever-improving policies and programs and training sessions.

The project is long term, and it requires constant care and feeding.

And yet it is a recurring phenomenon for courts and commentators to inevitably express tremendous surprise—when a longstanding fraud or scandal finally comes to light—that no one sounded the alarm, even though there were legions of people in a position to do so.

Listen to Judge Sporkin, of D.C. District Court writing this in an opinion arising out of the savings and loan crisis:

Judge Sporkin, *Lincoln Savings & Loan Ass'n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990): "Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions?"

But he went on; he didn't stop with corporate insiders:

"Where also," he wrote, "were the outside accountants and attorneys when these transactions were effectuated? What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case."

The disturbing truth is that in the shadow of most massive frauds are lurking all manner of enablers – people who were helpful either to the perpetration of the fraud or to its concealment.

Part of your job is to disable these enablers and ring the alarm bell early – by shouting from the hilltops that catastrophe awaits if attention is not paid and action is not taken.

If fraud examiners can figure out a way not just to find the fraud but help folks think about how to create a culture so that fraud is not committed in the first place and when fraud begins to be committed that other people are strong enough and courageous enough to come forward and put a stop to it or raise a red flag, everybody would be better off.

So I challenge everyone to think a little bit larger than what your daily job is, that everybody think a little more about developing cultures so fraud doesn't take root in the first place, I think we could save ourselves a lot of trouble.

As it stands now, a familiar pattern is repeated again and again, an insider fails to stand up or to sound alarms and thus too often create (or tolerate) the conditions precedent for corporate corruption – because there is lip service to strong “compliance” but no commitment to a strong culture. It happens again and again:

Someone provides the comfort of a professional opinion that nudges up against the edge of legitimacy.

Or someone aggressively exploits a vagueness in the tax code that pushes the bounds of propriety.

Or someone creatively manipulates the numbers under and accounting theory that strains the laws of mathematics.

It happens every day.

Someone pushes the envelope or looks the other way or just fails to do his job as a professional.

And time goes by and eventually the envelope-pushing gets more and more aggressive and the controls get less and less strict, and then finally the bad stuff really hits the fan.

And thousands of Monday morning quarterbacks – at the firm, on TV, and in Congress – wonder aloud what the heck happened.

But long before criminal prosecutors enter the picture, forward-thinking professionals like all of you can play a role – over time – in fighting off the creep of corruption that is keeping prosecutors and regulators so busy as we speak.

They say that what happens in Vegas, stays in Vegas. Perhaps you've heard it recently? But this is one instance where I hope you will take the message beyond Las Vegas when you go back to your organizations.

I cannot emphasize this enough: Your work is urgent and necessary. Because even as we speak, there are books being cooked;

Even as we speak, there is a company executive somewhere who is peddling inside information;

Even as we speak, someone is deliberately overvaluing an asset or understating a debt; Even as we speak, there is a board of directors being kept in the dark about a whistleblower's complaint; and

Even as we speak, there is some scandal being swept under the rug.

Now, some of this conduct will come to light in the next year, some the year after, some perhaps never.

People like those in my office may even be able to prosecute some of it.

But some of it will come to light too late—and in the intervening delay, evidence will be lost; fortunes will be squandered; accounts will be dissipated; and statutes of limitations will run.

And a question will be asked—the kind of question that Judge Sporkin asked in his opinion from the savings and loan crisis:

“Where . . . were the outside accountants and attorneys when these transactions were effectuated?”

“Why did not at least one professional blow the whistle to stop the overreaching that took place in this case?”

And so the question for you all is this:

What more are you in this room going to do when this conference is over and you go back to your desks?

How will you satisfy yourself that the institution you advise is a place where people are comfortable elevating ethical issues?

That it is a place where protections for blowing the whistle are not just in the company manual, but in the company's marrow?

How will you ensure that your colleagues will take their ethical obligations seriously? How will you test your belief that they do?

What will you do when an executive tries to put you off?

What will you say the next time you think a whistleblower complaint has been only shallowly investigated?

What will you do when a firm comes to you for an opinion that it is desperate for when you learn five other reputable law firms refused to provide it?

If you see something, you should say something. If you are aware of wrongdoing and have not been heard internally, you should come to us.

And if no one else is listening, we will listen. We will never turn a deaf ear.

It is not an easy thing to get institutions that are about maximizing profit to stay on the straight path. At the end of the day, though, all of the pain that I'm talking about, and all of the devastation that has occurred due to massive amounts of fraud, hurting real people with real lives and real aspirations and real jobs and real hopes, could have been avoided if those institutions stayed on the straight path.

It's part of our job to keep institutions on the straight path because it's the right thing to do, but also because it's the smart thing to do.

In the end, why take the straight path? Having quoted from Samuel Jackson earlier, I'll elevate a bit and quote from the French philosopher Montaigne, who said this:

"Were I not to follow the straight road for its straightness, I should follow it for having found by experience that in the end it is commonly the happiest and most useful track."

To everyone in the room, good luck herding people onto the straight road. Thank you for all that you do. Thank you for this honor. It was a pleasure to be here.

USAO - New York, Southern

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